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April 14, 2017

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, RM-10593

Dear Ms. Dortch,

On April 13, 2017, John Dobbins, Executive Vice President – Access, Mark Jeary, Senior Vice President – Planning Access Assurance, Lynn Hughes, Director – Regulatory Access, Eric Einhorn, Senior Vice President of Government Affairs and Strategy, and William Kreutz, Senior Advisor – Policy & Strategy, all of Windstream Services, LLC ("Windstream") and I, on behalf of Windstream, met with: Jay Schwarz, Acting Legal Advisor to Chairman Pai, Kris Monteith, Acting Chief of the Wireline Competition Bureau, and Lynne Engledow, David Zesiger, Justin Faulb, Greg Capobianco, Christopher Koves, Belinda Nixon, and Shawn Taylor of the Pricing Policy Division. Mr. Einhorn also spoke with Claude Aiken, Legal Advisor to Commissioner Clyburn, and with Amy Bender, Legal Adviser to Commissioner O'Rielly.

Messrs. Dobbins and Jeary discussed the impacts that Windstream foresees from the draft Order. Windstream would like nothing more than to move all its customers to Ethernet. However, this is not possible or would result in significant initial and recurring costs for many of the customers that today utilize DS1 and DS3 services. Many of these customers need only a relatively small amount of bandwidth, such as provided by one or two DS1s, provided over a reliable and secure connection. At these low bandwidth levels, such as 3 Mbps, Ethernet prices are much higher than DS1s, and moving these customers to Ethernet will require a significant increase in the charges these customers pay. Many of these customers cannot simply migrate to shared bandwidth services because of their security and reliability needs: for example, many financial service institutions and health care providers will not use shared bandwidth services because of security and reliability concerns. Under the draft Order, these DS1 and DS3 customers would likely see significant price increases as ILECs increase their underlying DS1 and DS3 rates, as they have done whenever they have been granted Phase 2 pricing flexibility. Cable and CLEC deployments are not nearly ubiquitous enough to halt these increases, as 86 percent of locations with cumulative bandwidth in the range of DS1s and DS3s (i.e., less than 50 Mbps) are served only by the ILEC, and these providers generally do not build out to reach low bandwidth locations in the absence of high special construction fees. In addition, the nation's second-largest cable company recently suspended accepting any new orders for its wholesale Ethernet-over-DOCSIS (i.e., Ethernet-over-HFC) service, leaving only one of the major cable companies offering this service and undercutting the premise that the threat of cable-company EoHFC service is growing and will restrain prices.

Furthermore, migrating these customers to Ethernet is a time-consuming and labor-intensive process involving site surveys, changes in customer premises equipment, and sometimes changes in network demarcation points, electrical supply and other physical infrastructure changes. This is frequently a six-to-nine-month process, and Windstream and its last-mile network suppliers logistically cannot migrate more than a few hundred customers per month under current staffing and processes. Even three years is far shorter than the time it would take to migrate all of Windstream's DS1 and DS3 customers to Ethernet.

To allow sufficient time to manage these various impacts as a result of the actions that would be taken under the draft Order, a transition period is necessary. A transition period will by no means eliminate disruption and price increases for small and medium-sized Main Street business consumers, but would at least provide some period in which to manage those disruptions and seek alternatives – to the extent possible. Accordingly, Windstream proposed the following phased transition plan:

- For new services, these could be introduced outside of price regulation and on a non-tariffed basis immediately (i.e., with permissive detariffing), with mandatory detariffing in three years.
- For currently ordered or provisioned tariffed circuits (including term plans and month-to-month), there is a three-year period of no unilateral rate increases. Parties can agree to new agreements, but otherwise existing price caps and plans stay in place for these circuits. At the end of three years, price protections end, and mandatory detariffing begins.
- For new circuits (new orders after the effective date for services currently tariffed), there is at least a two-year period of no unilateral rate increases with existing price caps and plans staying in place. After that period, the price protections are eliminated in "competitive" counties, with permissive detariffing for all services. Mandatory detariffing would begin after three years.
- A three-year suspension on tariffed or contractual TDM shortfall penalties based on DS1 or DS3 purchases.
- For all services and areas, there would be immediate Phase 1 pricing flexibility.

We explained that this transition plan is balanced to allow wholesale purchasers and their customers to make changes to existing circuits in an orderly fashion over the next three years and to mitigate rate shock, but to incent a faster transition with respect to new circuit orders. The two-year deferral of the elimination of price caps in non-Phase 2, "competitive" counties allows a reasonable period for purchasers to seek alternative sources of supply for channel terminations, including through newly constructed deployments, and to adjust business offerings where they cannot. Without such a period, ILECs can use price increases and long-term contracts to lock out the contestability through potential entry that the draft Order relies upon to predict that potential entry can discipline DS1 and DS3 rates. Three-year suspension of TDM shortfall penalties is necessary for two reasons. First, these penalties disincent and slow the migration to Ethernet because purchasers face the prospect that, if they do not purchase sufficient quantities of DS1 and/or DS3 TDM circuits, they will effectively have their entire existing circuit base with that ILEC re-priced at higher rates. Second, these penalties significantly raise the costs of switching from the ILEC to an alternative channel termination supplier. This means that the penalties reduce the ability of potential entry to discipline price increases on DS1 and DS3 circuits – contrary to the contestability theory underlying the draft Order's competitive market test. The suspension would be justified because of the changes being implemented by the draft Order, and to further the public interest in migrating from TDM to Ethernet.

We noted that this transition plan is in addition to, and does not supplant, the need for grandfathering of existing contracts as the draft Order proposes in Paragraph 163 and Rule 1.776, with the modifications Windstream has already proposed to more fully capture the contractual expectations under those agreements. This was described more fully in my letter of April 11, 2017 (at pages 2-3), which is incorporated by reference herein.[1]

Please contact me if you have any questions.

Sincerely,

John Nakahata
Counsel to Windstream

cc: Jay Schwarz
Claude Aiken
Amy Bender
Kris Monteith
Lynne Engledow
David Zesiger
Greg Capobianco
Justin Faulb
Christopher Koves
Belinda Nixon
Shawn Taylor

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[1] Letter from John Nakahata, Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 2-3, WC Docket Nos. 16-143, 05-25 & RM-10593 (filed Apr. 11, 2017).